MALAYSIAN INVERTEC SDN BHD

v.

CHAN MUN HONG

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-358-1997]
30 AUGUST 1998

CIVIL PROCEDURE: *Injunction - Interlocutory injunction, granting of - Whether would dispose of the action - Balance of convenience - Whether applicable*

This was a preliminary objection wherein it was argued that the plaintiff's application for interlocutory injunction was defective as it had the practical effect of adjudicating on the parties' rights without a trial.

Held:

[1] Where the refusal or the grant of an interlocutory injunction will effectively dispose of the action, the guidelines on the balance of convenience will not and cannot be applied as the interlocutory injunction has the practical effect of adjudicating on the parties' rights without a trial.

[2] The *American Cyanamid* principles will not apply if on the available evidence before the court there appears to be no unresolved dispute of fact. In a plain and uncontested breach of a very clear covenant not to do a particular thing and the covenantor does what he had promised not to do, then the balance of convenience as promulgated in *American Cyanamid* becomes irrelevant.

[3] The court is not precluded from granting an interlocutory injunction where this would virtually give the applicant the full relief actually sought to be secured at the final hearing on a balance of convenience. If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before trial.

[Preliminary objection dismissed.]

Cases referred to:
American Cyanamid Co v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***
Cayne & Anor v. Global Natural Resources plc [1984] 1 All ER 225 ***(refd)***
Doherty v. Allman [1878]s 3 App Cas 709 ***(refd)***

Gibb & Co v. Malaysia Building Society Bhd [1982] 1 CLJ 185 ***(refd)***
Hampstead and Suburban Properties Ltd v. Diomedous [1968] 3 MLJ 545 ***(refd)***
Roxy Electric Industries (Malaysia) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd & Ors [1989] 2 CLJ 657 ***(refd)***
Yogananthy a/p AS Thambaiya v. Idris bin Osman [1997] 5 CLJ 705 ***(refd)***

Other sources referred to:
Equitable Remedies, Spry, 3rd edn, p 312
Halsbury's Laws of England, 4th edn, vol 24, pp 511, 512

For the plaintiff - Jeyakumar Sundralingam; M/s Reginald Vallipuram & Co
For the defendant - Hua Kia Fook; M/s KF Hua & Partners

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

An argument was advanced by way of a preliminary objection that the summons-in-chambers filed by the plaintiff in encl. 11 was defective as it sought for an interlocutory injunction which has the practical effect of adjudicating on the parties' rights without a trial. In short, it was said that the plaintiff sought for an interlocutory injunction that will effectively dispose of the action. The prayers sought for in encl. 11 were worded thus:

(i) Satu Injunksi untuk menghalang Defendan samada secara dirinya sendiri, pengkhidmat-pengkhidmatnya atau agen-agennya atau dalam keadaan bagaimanapun bagi satu tempoh berakhir pada 17hb September 1999 daripada memasuki secara sendiri atau bersesama dengan mana-mana orang atau orang-orang lain atau syarikat dan memasuki bagi pihaknya sendiri atau bagi pihak mana-mana orang atau orang-orang lain atau dalam bertanding secara langsung atau tidak langsung, menjalankan atau untuk menolong dalam menjalankan samada sebagai prinsipal atau sebagai Pengurus, agen pengkhidmat atau pembantu atau di dalam apa-apa sifat lain bagaimanapun atau di dalam apa-apa cara terlibat atau mengambil bahagian atau mempunyai kepentingan di dalam perniagaan pembuatan dan pembekalan bahan-bahan INVERTEC di Malaysia;

(ii) Satu Injunksi untuk menghalang Defendan secara dirinya sendiri, pengkhidmat-pengkhidmatnya dan atau agen-agennya dan atau dalam keadaan bagaimanapun daripada berusaha atau mencuba secara langsung atau tidak langsung untuk mendorong mana-mana orang atau orang-orang firma atau syarikat yang sejurus sebelum penamatan perkhidmatan Defendan adalah pelanggan atau pelanggan-pelanggan untuk Plaintif

dengan mana beliau telah mempunyai urusan atau untuk mengambil khidmat atau berurus sedemikian dengan syarikat pihak ketiga tersebut atau mana-mana orang atau orang-orang firma atau syarikat selain daripada Plaintif;

(iii) Satu Injunksi untuk menghalang Defendan samada secara dirinya sendiri, pengkhidmat-pengkhidmatnya atau agen-agennya atau dalam keadaan bagaimanapun daripada menggunakan dan/atau untuk mendedahkan apa-apa maklumat sulit yang telah diperolehi oleh Defendan semasa tempoh perkhidmatan tersebut oleh Plaintif dan/atau apa-apa rahsia tred Plaintif termasuk tetapi tanpa prejudis kepada keluasan makna yang berikut iaitu dokumen-dokumen yang dirujuk di perenggan 8.02 di dalam Affidavit yang menyokong permohonan ini kepada syarikat pihak ketiga tersebut atau kepada mana-mana pihak lain;

(iv) Satu Perintah untuk penyerahan balik atau kemusnahan semua dokumen-dokumen yang dirujuk di perenggan 8.02 di dalam Affidavit yang menyokong permohonan ini penggunaannya di mana adalah satu perlanggaran injunksi-injunksi yang tersebut di atas;

(v) Bahawa Defendan hendaklah membayar kepada Plaintif kos untuk dan bersampingan permohonan ini untuk ditaksir;

(vi) Apa-apa relief selanjutnya atau yang lain yang difikirkan sesuai oleh Mahkamah yang Mulia ini.

This judgment is confined to the preliminary objection and nothing more. The merits of encl. 11 will not be examined. The degree of permanence of the interlocutory injunction as exemplified in prayer (i) of encl. 11 was the sore point that riled up the passion of the defendant. It was an interlocutory injunction which was expressed to have effect until 17 September 1999. Spry, *Equitable Remedies*, 3rd edn, at p. 312 explained the difference between interlocutory injunction and perpetual injunction in this way:

> They may be classified as interlocutory or interim injunctions, on the one hand, where the order itself is expressed to have effect only until a further hearing takes place or until a named day or else contains some similar limitation, and perpetual injunctions on the other hand, where the order is not so expressed or limited.

At first blush, the preliminary objection seems to be well founded. *Halsbury's Laws of England*, 4th edn, vol. 24 at p. 512 circumscribed the interlocutory injunction in this way:

> The object of an interlocutory or interim injunction is to preserve matters pending the trial of matters in dispute .... .

while a perpetual injunction was said to be (see p. 511 of *Halsbury's Laws of England*, 4th edn, vol. 24):

> .... based on a final determination of the rights of the parties, and is permanently to prevent infringement of those rights and obviate the necessity of bringing action after action in respect of such infringement.

Zakaria Yatim J (now FCJ) would have agreed with the preliminary objection advanced by the defendant and this is exemplified by his Lordship's judgment in the case of *Roxy Electric Industries (Malaysia) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd & Ors* [1989] 3 MLJ 231; the headnote of which reads as follows:

> In considering whether an interlocutory injunction ought to be granted, the principles laid down in *American Cyanamid* should be applied. However, in a case where an injunction sought by the plaintiff would mean giving him judgment against the defendant without permitting the defendant the right of trial, the court will not consider whether there is a serious question to be tried or look at the balance of convenience since the defendant should not be precluded by the grant of an interlocutory injunction from disputing the plaintiff's claim. The test to be applied would be (a) whether the grant or refusal of an injunction would put an end to the matter without trial and (b) the court has to consider the balance of the risk of doing an injustice. In this case, if the court grants an injunction, the requisition would have no effect and there will be no trial of the action. This would mean giving the plaintiffs judgment and the defendants would have no opportunity to bring the case to trial. Further, the risk of doing an injustice is greater if the injunction is granted. Substantial justice to the shareholders would be done if they were given the opportunity to elect their new directors. Whether the defendants would succeed in passing the resolution is a matter for the shareholders to decide.

Incidentally, his Lordship Zakaria Yatim J (now FCJ) in deciding *Roxy Electric Industries (Malaysia) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd & Ors [supra]* relied and followed the case of *Cayne and another v. Global Natural Resources plc* [1984] 1 All ER 225 (CA), a decision of Eveleigh, Kerr and May LJJ. Of pertinence would be the decision of May LJ at p. 238 of the report which merits reproduction and it is this passage that was relied upon by the defendant in support of the preliminary objection:

> Where a plaintiff brings an action for an injunction, I think that it is, in general, an injustice to grant one at an interlocutory stage if this effectively precludes a defendant from the opportunity of having his rights determined in a full trial. There may be cases where the plaintiff's evidence is so strong that to refuse an injunction and to allow the case to go through to trial would be an unnecessary waste of time and expense and indeed do an overwhelming injustice to the plaintiff. But those cases would, in my judgment, be exceptional.

> In general, as I say, where a plaintiff brings an action and in it seeks an interlocutory injunction on the basis that the defendant has breached the former's rights, then justice requires that that defendant should be entitled to dispute the plaintiff's claim at a trial, and if the grant of the injunction would preclude this then it should not be granted on an interlocutory basis.

In summary form, both these two cases (*Roxy Electric* and *Cayne*) established the law that where the refusal or the grant of an interlocutory injunction will effectively dispose of the action, the guidelines on the balance of convenience would not and cannot be applied as the interlocutory injunction has the practical effect of adjudicating on the parties rights without a trial. I said in the same vein in *Yogananthy a/p AS Thambaiya v. Idris bin Osman* [1997] 5 CLJ 705 at 726; [1997] 1 AMR 670 at 694, and a reproduction thereof would be justifiable in the circumstances:

> Thus, where the refusal or the grant of an interlocutory injunction will effectively dispose of the action, the guidelines on the balance of convenience cannot apply as the interlocutory order has the practical effect of adjudicating on the parties' rights without a trial: *Roxy Electric Industries (M) Bhd v. Syarikat Nominee Bumiputra Sdn Bhd* [1989] 3 MLJ 231; *Cayne v. Global National Resources* [1984] 1 All ER 225. In such a situation – like the one presenting itself in the instant case, the principle to apply would be: 'What can the Court do in its best endeavour to avoid injustice ?' (per Everleigh L.J. in *Cayne v. Global National Resources* [1984] 1 ALL ER 225 at page 232 at line g). The best endeavour to avoid injustice would be to refuse the prayers sought for in enclosure 17 with costs and I so ordered accordingly.

Now, the *American Cyanamid* principles *(American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504) should not be blindly followed in all cases. It is not meant to be rigidly applied to all cases. Even Lord Diplock at p. 511 acknowledged this fact:

> I would reiterate that, in addition to these to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

Thus, if on the available evidence before the court there appears to be no unresolved dispute of fact, the *American Cyanamid* principles will not apply. Perhaps a little elaboration would suffice. In a plain and uncontested breach of a very clear covenant not to do a particular thing, and the covenantor proceeds rather promptly to do what he has promised not to do, then the balance of convenience as promulgated by *American Cyanamid* becomes irrelevant (*Hampstead and Suburban Properties Ltd v. Diomedous* [1968] 3 MLJ 545 at 550; and *Doherty v. Allman* [1878] 3 App Cas 709 at pp. 719 to 720).

With this short but interesting digression, I must now revert to the preliminary objection. I am indebted to Abdoolcader J (as he then was), a brilliant judge, who in *Gibb & Co v. Malaysia Building Society Bhd* [1982] 1 MLJ 271, speaking for the then Federal Court destroyed the preliminary objection of the defendant by a stroke of the pen. That brilliant judge proceeded at great length at pp. 273 to 274 of the report and I can do no better than to reproduce them for us to saviour:

> Before we deal with the issues raised we should perhaps touch on a point made by Mr. Sri Ram for the appellant in referring to the judgment of this court in *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1979] 1 MLJ 150 which, referring to a pronouncement to that effect in *Wah Loong (Jelapang) Tin Mine Sdn Bhd v. Chia Ngen Yiok* [1975] 2 MLJ 109, 114, restates *inter alia* that an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases. That statement of the law is correct as an interlocutory application for a mandatory injunction is a very exceptional form of relief (*Canadian Pacific Railway v. Gaud* [1949] 2 K.B. 239, (at page 249)), but there is no reason why interlocutory or indeed interim mandatory injunctions should not issue in proper and appropriate cases and the court has jurisdiction to so order. Fry L.J., said in *Bonner v. Great Western Railway Company* [1883] 24 Ch.D. 1, (at page 10): 'I have no doubt of the jurisdiction of the court to grant a mandatory injunction on interlocutory applications as well as the hearing.' The case however must be 'unusually sharp and clear' (*Shepherd v. Sandham* [1971] Ch. 340), and the court must feel a high degree of assurance that at the trial a similar injunction would probably be granted but we should observe that questions of degree are involved which depend *inter alia* upon considerations of hardship to the parties.
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> In deciding the manner of interlocutory injunction that should be granted courts of equity will consider how the interests of the parties may best be protected, bearing in mind both the position of the parties subsequently at the final hearing and also questions of hardship and inconvenience in the meantime, and will take into account any other relevant discretionary considerations which may arise. One of the most important circumstances which will be taken into account by the court is the degree of probability with which it appears to be established that the applicant will ultimately succeed at the final hearing. The stronger the case of the applicant that the matters complained of are unlawful, the more likely it is that it will be found to be just and equitable that his interests be protected by the immediate issue of an injunction (*Bonner v. Great Western Railway Company [supra]*). Other matters of particular importance are, on the one hand, the ease or difficulty with which there can be compliance with a mandatory order and the extent of hardship which compliance will cause the respondent and, on the other hand, the nature of the injury and inconvenience which will be caused to the applicant if he does not obtain protection at once (*Strelley v. Pearson* [1880] 15 Ch.D. 113, (at page 117)).

Adverting now to the points taken in advancing the appeal:

(1) Whole relief granted by interlocutory order.

The short answer to the issue raised in this respect is that the court is not precluded from granting an interlocutory injunction where this would virtually give the applicant therefor on his claim the full relief actually sought to be secured at the final hearing when the matter is viewed on a balance of convenience (*Woodford v. Smith* [1970] 1 W.L.R. 806, (at pages 817-818): *Wah Loong (Jelapang) Tin Mine Sdn Bhd v. Chia Ngen Yiok* (at page 114); *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd [supra]*). If there is plainly no defence to the action, and the only object in raising a defence is delay, an injunction should issue even if it gives the applicant his whole remedy before the trial (*Manchester Corporation v. Connolly* [1970] 1 Ch. 420, (at page 427)).

In *Bryanston Finance Ltd v. De Vries (No.2)* [1976] 1 Ch. 63, 76, 81, Buckley L.J., said (at page 76) that in relation to a petition for the winding-up of a company, the action (for an injunction to restrain the petitioner from petitioning for winding-up) as a whole is in the nature of an interlocutory proceeding. The court in that case held that the company was only entitled to interlocutory relief if on the available evidence it could be said that presentation of a petition would *prima facie* be an abuse of process, and Sir John Pennycuick said (at page 81):

> The decision in the *American Cyanamid* case was, as I understand it addressed to interlocutory motions in the sense of motions seeking interim relief pending determination of the rights of the parties at the hearing of the action ... I do not think the decision should be read as applicable to motions which, though interlocutory in form, seek relief which will finally determine the issue in the action ...

This is in effect a judicial acknowledgement on the lines of the observation by Lord Denning M.R., in *Fellowes & Son v. Fisher* [1976] Q.B. 122, (at page 129) that an interlocutory decision is often for all practical purposes final, and indeed Lord Diplock in his judgment in the House of Lords in *N.W.L. Ltd v. Woods* [1979] 1 W.L.R. 1294, (at page 1306) spoke to the same effect in discussing the decision of the House in *American Cyanamid Co v. Ethicon Ltd [supra]*.

In the matter before us the purchasers' dispute is with the developer who they allege has defrauded them. It is further highly questionable whether the moneys purportedly paid by the purchasers to the developer without the knowledge or consent of the respondent for extras which were not however provided would in fact form part of the purchase price of the units to affect the ceiling stipulated in the Programme. The respondent has expended a very large sum of money to provide finance for the purchasers in this housing project and must

necessarily have security by way of charges over the several units in question. Considering all the circumstances of this case, the rights of the parties and the balance of convenience in the matter, we are of the view that this is a case where the court is not precluded from granting the order sought although in effect the respondent would as a result secure the basic relief sought in the action.

The upshot of it all was this. The preliminary objection was dismissed with costs.